

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 727

PETITION OF NORFOLK SOUTHERN RAILWAY COMPANY TO INSTITUTE A
RULEMAKING PROCEEDING TO ADDRESS ABUSES OF BOARD PROCESSES

Digest:¹ The Board denies a petition to institute a rulemaking proceeding to establish new rules creating a pre-approval process for filings submitted by parties deemed abusive filers, as well as financial responsibility presumptions and additional financial responsibility certifications in the offer of financial assistance process. Instead, the Board will seek to address the concerns raised in the petition through increased enforcement of the Board's existing rules and by instituting an advanced notice of proposed rulemaking.

Decided: September 23, 2015

On May 26, 2015, Norfolk Southern Railway Company (NSR) filed a petition to institute a rulemaking proceeding to address abuses of Board processes. In response to the petition, the Board received seven comments. After consideration of the petition and the comments received, we are not persuaded that NSR's suggested changes to the Board's regulations are warranted at this time. Accordingly, we will deny NSR's petition to institute a rulemaking proceeding.

BACKGROUND

Summary of the Petition. In its petition, NSR proposes that the Board initiate a rulemaking to establish several changes to the Board's procedures for filings and offers of financial assistance (OFA). NSR proposes the Board establish: (1) a process for identifying an individual as "an abusive filer, a filer for harassment purposes, or a filer who lacks standing or any cognizable interest in a proceeding" and a pre-approval process for filings submitted by such individuals; (2) a rebuttable presumption in the OFA process that individuals previously found not financially responsible or who have been bankrupt are not financially responsible and a pre-approval process for the OFA filings of such individuals; and (3) rules to require additional

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

procedures and certifications concerning financial responsibility by potential offerors in the OFA process.²

With respect to the pre-approval requirement, NSR proposes a new regulation, 49 C.F.R. § 1103.36, titled “Persons and Entities Requiring Prior Approval,” which would provide:

A person or entity who has been designated by the Board, upon the Board’s own motion or upon complaint, as an abusive filer, a filer for harassment purposes, one who lacks standing or an interest in proceedings, or, in the case of offers of financial assistance, not a financially responsible party is required to obtain approval from the Director of Proceedings before filing any document in any proceeding before the Board until such time as that designation is removed by the Board. Such documents submitted to the Director of Proceedings for prior approval must be submitted on the person’s or entity’s behalf by counsel or a practitioner, both of whom are subject to the Canons of Ethics in Part 1103, subpart B of Title 49 of the Code of Federal Regulations.

With respect to the rebuttable presumption of non-responsibility, NSR proposes an addition to 49 C.F.R. § 1152.27(c)(1)(ii)(B) establishing a presumption that certain OFA offerors are not financially responsible and requiring those offerors to disclose the facts giving rise to this presumption in their OFA. Specifically, NSR proposes that 49 C.F.R. § 1152.27(c)(1)(ii)(B) should be amended by adding:

offerors who have previously been found not to be financially responsible or who have been bankrupt will be presumed not to be financially responsible and must disclose in the offer that they have previously been found not to be financially responsible or have been bankrupt

Finally, NSR proposes additional procedures and certifications to be included in 49 C.F.R. § 1152.27(c)(1)(ii). In particular, NSR proposes new subsections (D) and (E) that would require an OFA offeror to:

(D) Certify that the offeror has established and funded an earnest money escrow or deposit prior to submitting the offer that is equal to ten (10) percent of the carrier’s estimate; and (E) Provide either (i) a certification from a financial institution or a certified public accountant of the offeror’s financial position or (ii) a representation, signed under penalty of perjury, from the offeror that it has not previously made an offer under this section that it was unable to consummate.

NSR argues that this rulemaking is necessary because the Board has received “numerous filings in various proceedings that merely serve to waste limited resources and distract the Board

² NSR Pet. 2, 4.

and parties to proceedings from a consideration of the relevant issues.”³ NSR also argues that other federal agencies, such as the Federal Communications Commission, and state and federal judicial courts have similar rules imposing restrictions on vexatious litigants.⁴ NSR states that the Board’s adoption of its proposed rules would “ensure meaningful participation in Board proceedings,” promote efficient proceedings, and “serve to enforce the Board’s existing Rules of Practice.”⁵

Comments Received. Of the seven comments received in response to NSR’s petition,⁶ five support NSR’s petition, while two oppose the petition.

The railroads and ATLP support the petition. They generally agree with the reasoning NSR gives for its petition and reiterate NSR’s argument that vexatious or frivolous filings unfairly consume the resources of the Board.⁷ KCS and CP also argue that a rulemaking to address abuses of Board processes would be consistent with the rail transportation policy of 49 U.S.C. § 10101.⁸

SMART/TD-NY and Riffin oppose NSR’s petition. They argue that rules like those proposed by NSR are not necessary.⁹ SMART/TD-NY also argues that the proposed rules would be of limited scope and “not of widespread application to the transportation industry.”¹⁰ Riffin argues that the existing regulations at 49 C.F.R. § 1104.8 are sufficient to address the issues NSR seeks to solve with regard to abusive filers and that NSR’s proposed changes to the OFA process would not be useful.¹¹

³ NSR Pet. 2.

⁴ NSR Pet. 13-16.

⁵ NSR Pet. 3, 17.

⁶ Comments were received from: Kansas City Southern Railway Company (KCS); CSX Transportation, Inc. (CSXT); Union Pacific Railroad Company (UP); Canadian Pacific Railway Company, Soo Line Railroad Company, Delaware and Hudson Railway Company, Inc., and Dakota, Minnesota and Eastern Railroad Corporation (filing collectively as CP); the Association of Transportation Law Professionals (ATLP); Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY); and James Riffin (Riffin).

⁷ KCS Comments 2; ATLP Comments 1; CSXT Comments 1; UP Comments 1; CP Comments 2.

⁸ KCS Comments 1; CP Comments 1-2.

⁹ SMART/TD-NY Comments, MacDougall Statement 7; Riffin Comments 7.

¹⁰ SMART/TD-NY Comments 3.

¹¹ Riffin Comments 7-8, 12.

DISCUSSION AND CONCLUSIONS

The Board understands and shares NSR's concerns regarding inappropriate filings and the strain such filings place on the resources of the Board and the parties before us. However, after consideration of the petition and the comments received, we do not believe that the rulemaking proposed in NSR's petition is appropriate at this time. The Board concludes that it will be more efficient, in the first instance, if the Board seeks to address the issue through increased enforcement of the Board's existing rule addressing irrelevant and immaterial pleadings at 49 C.F.R. § 1104.8 (allowing the Board to strike from any document any material that is "redundant, irrelevant, immaterial, impertinent, or scandalous"). The Board has only infrequently used this regulatory provision in the past to strike inappropriate material. Increasing the appropriate use of this existing rule may allow the Board to effectively address abusive filings without the need for additional rules. We note that it would be within the scope of the Board's authority to propose and institute rules to address abusive filers, including rules similar to those suggested by NSR, if the Board believes such rules are necessary in the future.

Next, with respect to NSR's proposed changes to the OFA process, we are not persuaded that the proposed changes—a presumption of non-responsibility and additional certifications for certain offerors—would be practical to administer, nor that they strike the right balance between protecting the process from possible abuse and ensuring meaningful participation in the process for those with a legitimate interest in preserving rail service. Offerors already bear the burden of establishing their financial responsibility, Burlington Northern Railroad—Abandonment Exemption—in King County, Wash., AB 6 (Sub-No. 357X), slip op. at 4 (ICC served April 25, 1994), so it is unclear what a presumption of non-responsibility would add. In addition, NSR's proposal that potential offerors place earnest money into an escrow account could merit further consideration, but we have concerns about the practicality of administering the proposed escrow certification requirement that would need to be addressed before such a requirement could be implemented. See R.R. Ventures, Inc.—Aban. Exemption—between Youngstown, Ohio, & Darlington, Pa., in Mahoning & Columbiana Ctys, Ohio, & Beaver Cty., Pa., AB 556 (Sub-No. 2X), slip op. at 2-3 (STB served Dec. 13, 2004). Finally, we have concerns about the proposal to require either a certification from a financial institution of the offeror's financial position, or a verified statement from the offeror that it has not previously made an OFA that it was unable to consummate. This change would seem to lower the existing burden on offerors with regard to showing financial responsibility. Under the Board's current practice, the Board can and typically does require a certification from a financial institution of the offeror's financial position. But the change proposed by NSR implies that, if an offeror certifies that it has not previously made an OFA that it was unable to consummate, it does not need to provide a certification from a financial institution.

However, the Board shares the concerns raised by NSR about the need to improve the OFA process. We believe that, in light of the Board's years of experience with the OFA process, it is an appropriate time to consider possible revisions to improve the efficiency and integrity of that process. As a result, the Board intends to serve an advanced notice of proposed rulemaking

to give interested parties an opportunity to comment on possible changes to the OFA process that may improve that process and protect it against abuse.¹²

For the foregoing reasons, NSR's petition to institute a rulemaking proceeding will be denied.

It is ordered:

1. NSR's petition to institute a rulemaking proceeding is denied.
2. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

¹² Our discussion of NSR's OFA proposals here does not mean we would not consider similar proposals, such as a requirement for potential offerors to put up earnest money, in the forthcoming rulemaking if the concerns the Board has expressed here are addressed.